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**JURISDICTION**[1]

The decree of the specially constituted District Court to be reviewed was entered April 24, 1926. (R. 162.) The direct appeal to this Court was allowed June 10, 1926. (R. 474.) The lower court denied a motion for temporary injunction (R. 145), and then dismissed the bill on the merits.

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[1] Under the heading "Jurisdiction of Plaintiff" (R. 1) the bill alleges the appellant is a corporation of Ohio and Indiana and "not of the State of Illinois." Under the heading "Jurisdiction of Defendants and Cause" (R. 2) the bill alleges:

"that all of said three corporations are citizens and residents of the State of Illinois, and there is a diversity of citizenship as between them and each of them, and your petitioner, * * * ; that this is a suit of a civil nature in equity between your petitioner and said three corporations as the substantial parties, * * * and the matter and sum in controversy * * * exceeds * * * the sum and amount of $4,000.00." (R. 2.)

By special appearance the Government challenged the jurisdiction based on the diversity of citizenship of corporations in a suit against the United States to set aside and enjoin an order of the Commission (R. 146) on the ground that such a suit may be maintained only under the Urgent Deficiencies Act (c. 32, 38 Stat. 219, 220; U. S. C. Title 28, Sec. 48). After hearing the special appearance was overruled and the Government answered. (R. 145, 147.) Thenceforth the Court treated the case as if it had been commenced under the Urgent Deficiencies Act.

The bill avers that defendant J. K. Dering Coal Company "has its principal place of business and business office located at 332 South Michigan Avenue in the City of Chicago." (R. 2.) Although not averred in the bill, it otherwise appears that the order was entered by the Commission on the petition of that defendant "an Illinois corporation, engaged in the mining of coal in Saline County, in southern Illinois"

The suit was brought to set aside an order of the Interstate Commerce Commission, and the jurisdiction of this Court on direct appeal rests on the Urgent Deficiencies Act of October 22, 1913 (c. 32, 38 Stat. 219, 220) and Section 238 of the Judicial Code as amended by the Act of February 13, 1925. (U. S. C. Title 28, Sec. 47.)

**QUESTIONS**

In the absence of a certificate of public convenience and necessity (R. 133) issued under Section 1 of the Interstate Commerce Act (c. 91, 41 Stat. 477), was the order of the Commission (R. 129) which required the Railway to construct, maintain, and operate at its own expense a *switch connection* between the siding of the coal company and the line of the Railway—

(1) authorized by paragraph (9) of Section 1 (c. 309, 36 Stat. 547; c. 91, 41 Stat. 475; U. S. C. Title 49, Sec. 1, paragraph (9) R. 87, 124), and

(2) based on substantial evidence; or

(3) prohibited by paragraphs (18) to (21) of Section 1 (c. 91, 41 Stat. 477, 478; U. S. C. Title 49, Sec. 1, paragraphs (18) to (21) (R. 133)?

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(R. 116), and "a corporation duly organized and existing under the laws of the State of Illinois for the purpose, among other things of conducting the business of producing and selling bituminous coal, with principal office located at 1914 McCormick Building, Chicago, Illinois" (R. 84). There does not appear to be either averment or finding that J. K. Dering Coal Company has its "residence" in Northern District of Illinois, a requirement of Urgent Deficiencies Act.

STATUTES

The Act approved June 29, 1906 (c. 3591, 34 Stat. 584), amended the Act entitled, "An Act to regulate commerce," approved February 4, 1887, as amended (c. 104, 24 Stat. 379) by adding to Section 1 of the latter, *inter alia*, the following paragraph, viz:

> Any common carrier subject to the provisions of this Act, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper, such shipper may make complaint to the commission, as provided in section thirteen of this Act, and the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor and the Commission

may make an order, as provided in section fifteen of this Act, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the Commission, other than orders for the payment of money.

The Commerce Court Act (c. 309, 36 Stat. 547; U. S. C. Title 49, Section 1, paragraph (9)) re-enacted the foregoing paragraph with the slight italicized modifications, viz:

> Any common carrier subject to the provisions of this Act, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper *or owner of such lateral, branch line of railroad,* such shipper *or owner of such lateral, branch line of rail-*

> *road* may make complaint to the commission, as provided in section thirteen of this Act, and the commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor, and the commission may make an order, as provided in section fifteen of this Act, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the commission, other than orders for the payment of money.

The Transportation Act of 1920 made no change in the paragraph beyond inserting "(9)" at the beginning (c. 91, 41 Stat. 475, 476).

## STATEMENT

In 1917 J. K. Dering Coal Company acquired 3,700 acres of bituminous coal land near Eldorado, Saline County, Illinois, which is estimated to contain 28 to 30 million tons yet unmined. (96 I. C. C. 143; R. 117.)

In the center of the tract is located the hoisting shaft and mine tipple, which is 2.5 miles northwest of the right of way of the C., C., C. & St. L. and immediately north of the right of way of the Illinois Central, which extends east and west from East St. Louis to Eldorado where it connects with the C., C., C. & St. L., which runs in a northeasterly and southwesterly direction. (96 I. C. C. 144; R. 117.)

Dering Company's most modernly equipped mine has a potential capacity of 4,000 tons per day and should easily and regularly produce 3,500 tons per day. The maximum produced is 2,700 to 2,800 tons per day, or between 50 and 60 cars. The mine has not reached its full development and Dering Company claims the potential capacity could be produced by increasing the labor supply and without enlarging the mine capacity or facilities. (96 I. C. C. 144; R. 117.)

The Illinois Central was the only outlet. The mine is located on a branch about 50 miles from the assembling yard and by reason of curves, grades and other conditions the Illinois Central was unable to handle in excess of 25 loads per train from the mine to the assembling yard. Dering Company advanced as reasons for the failure of the mine to develop properly that the Illinois Central was unable to furnish sufficient car service. (96 I. C. C. 144; R. 117.)

Prior to the acquisition of the coal lands Dering Company entered into negotiations with the C., C., C. & St. L. and Illinois Central relative to securing service from both. Reciprocal switching arrangements by the carriers were proposed but when the production on which it was based was reached in 1919, C., C., C. & St. L., instead of proceeding with the proposed reciprocal switching arrangement, suggested the building of a private track from the mine to a point on the line of the C., C., C. & St. L. west of Eldorado. (96 I. C. C. 144, 145; R. 118.)

C., C., C. & St. L., through its engineering corps, made the survey and, working in connection with Dering Company's mine engineer, they laid out a tentative switch track the location of which does not differ materially with the one which has been constructed. Because the corporation was not making any expenditures during Federal control, C., C., C. & St. L. refused to proceed further in accordance with the suggestion or to arrange for the consummation of the reciprocal switching arrangement.

On November 1, 1921, following the decision in which the Commission declined to give a joint status to Dering's mines (*Dering Mines Co.* v. *Director General*, 62 I. C. C. 265), C., C., C. & St. L., through its traffic manager, wrote to Dering Company:

> If your company cares to construct and maintain at your own expense a track from your mine up to our line, we will be glad to effect connection with such track, the point of connection of course to be designated by our operating department. (96 I. C. C. 145; R. 118.)

After further correspondence on the same subject, Dering Company acquired the right of way in fee at a purchase cost of $33,000. In order to reach the line of C., C., C. & St. L. over the acquired property it was necessary to cross several highways and the rights of way of the Illinois Central, and an electric line (96 I. C. C. 145; R. 119) operating between Eldorado and Carrier Mills paralleling the line of C., C., C. & St. L. on the north. Under a con-

tract dated December 20, 1922, between Dering Company and Illinois Central, the latter agreed, upon payment to it by Dering Company of $60,000, "to lay and construct said track and furnish all material needed therefor" (109 I. C. C. 59; R. 137, 138), and "the employes of the Railroad Company while engaged in the construction and maintenance of said track, and supervision of such work, shall, while so engaged, be considered the sole employes of the Coal Company" (109 I. C. C. 60; R. 138).

The contract provides the Illinois Central shall have the right to use the track and operate its engines and cars thereover for the purpose of serving the mine or mines of Wasson Coal Company located in the vicinity of the connection of that track with the tracks of the C., C., C. & St. L., including also mines of any other company, or for any other purpose not inconsistent with the use of the track by the Dering Company, or any other companies permitted by Dering Company to use the track. Illinois Central at its own expense was also permitted to construct spur tracks leading out of the track. (96 I. C. C. 151; 109 I. C. C. 61; R. 140.)

The contract with the electric line provides that for the privilege of crossing its right of way, Dering Company shall grant to the electric line the right to operate locomotives or electric engines, trains, and cars over the track for the purpose of transporting passengers and freight from and to all points of origin and destination on the mine lead track, or

transporting freight and passengers originating and destined from and to points on the connecting line, and the right to construct on and from said mine lead track and over and upon the right of way of said mine lead track a wye, or other suitable track connection between the mine lead track and the track of the electric line. (96 I. C. C. 150; R. 125, 412, 413.)

The construction of Dering Company's track was commenced in the latter part of 1923 and finished in early part of 1924; it connects with the lead track of Dering Company about 200 feet north of the crossing of Illinois Central and extends in a southerly direction 2.5 miles toward the C., C., C. & St. L. line and ends at approximately the line of the right of way. The track consists of 85-pound re-lay rails on creosoted ties which rest on 12 to 18 inches of cinders, gravel, etc., and in good line and surface. The crossing with the electric line and Illinois Central are of 90-pound rail. (96 I. C. C. 146; R. 120.) C., C., C. & St. L. officials had no information at the time of the conferences that an attempt would be made to have the Illinois Central operate over this track and the right to extend spurs from it. (96 I. C. C. 146; R. 120.)

Dering Company made repeated written requests upon C., C., C. & St. L. for the switch connection, one of which was made after the track had been constructed. The cost of the switch connection is estimated at $2,000 and Dering Company contends

that the traffic which will be handled over the connection will be sufficient to justify the installation and maintenance. (96 I. C. C. 147; R. 121.)

In a period of full car supply Dering Company shipped a great percentage of its coal to Chicago and territory beyond, while four competitors with mines on the C., C., C. & St. L. line in Saline County shipped only 21.7 per cent of their tonnage to the same territory. With an outlet over C., C., C. & St. L., Dering Company contends it would have been able to ship more coal because of additional markets and that it was precluded from markets in Michigan and Indiana because coal dealers prefer a one-line haul. (R. 121.)

The complaint prayed for an order under Section 1 directing C., C., C. & St. L. to construct, maintain, operate, or install a switch connection (R. 87). After answer and hearing the first report and order was filed by Division 5. (R. 129.) On further argument on petition of C., C., C. & St. L. the whole Commission concurred in the second report beginning with the statement "The material facts are stated in the report of division 5, 96 I. C. C. 143, and are not in controversy." (109 I. C. C. 55; R. 130.) The second order, which merely postponed the effective date of the first order from February 7, 1925 to May 4, 1926, was then entered. (R. 134.)

## SUMMARY OF ARGUMENT

The provisions of paragraphs 18 to 21 are negative against the carrier only, whereas the provisions

of paragraph 9 are positive; in the former the carrier only and in the latter the shipper may make application to the Commission and procure the order for the objects which the respective statutes permit.

The purposes which the two statutes were designed to subserve differ proportionately as the methods differ by which they may be enforced.

On the undisputed facts the Commission has found that the Dering Company has fulfilled all of the requirements imposed by paragraph 9.

The argument that the case is controlled by the laws of the State of Illinois and not by the Interstate Commerce Act is contrary to the law established by a long line of decisions.

The fact that the appellant also owns and is engaged in the development of coal lands and properties and desires to protect its own private enterprise does not create a basis for refusal and failure to complete the switch connection.

**ARGUMENT**

The foundations underlying the extended arguments of the learned counsel for the appellant would seem to be that Dering Company's track is either a "sidetrack" within the meaning of paragraph (22) or a "connecting railway" and "an extension of railways" within the meaning of paragraphs (18) to (21) of Section 1 (Appendix A) (Br. 57); "the track is not a private sidetrack" (Br. 62); "appellant is not so situated that it can claim the benefit

of paragraph (9) of Section 1" (Br. 78); "appellee is not a shipper on the railway of appellant tendering interstate traffic to appellant for transportation within the meaning of paragraph 9" (Br. 11).

In order to maintain their position counsel are driven to the extreme of arguing that paragraph (9) was "modified" by paragraphs (18) to (22) of Section 402 (Br. 61); moreover, that the statutes of Illinois relating to railways and the opinions of the State courts concerning the same must, in effect, also be read into the Interstate Commerce Act to the end that the State statutes and decisions which tend to support counsel's theory may prevail that the Dering Company's switch track "is not a private sidetrack but a public interstate railway" which no carrier had the right to build "without a certificate of public convenience and necessity" (Br. 84).

Learned counsel misconceive entirely the purposes which paragraphs (18) to (21) were designed to subserve. The most cursory examination of those paragraphs will disclose that they are laid against the action of the carriers; thus, "no *carrier* * * * shall undertake the extension * * * or the construction," and so forth; and "no *carrier* * * * shall abandon," and so forth. In all instances the prohibitions are against the carrier. The purposes of these prohibitions are well known and may not be mistaken.

Congressman Esch (Wisconsin), on November 11, 1919, in reporting the railroad bill to "the Com-

mittee of the Whole House on the state of the Union" for the consideration of bill H. R. 10453, said:

> In section 402 we treat of extensions and abandonments. We believe one main cause of the so-called "weak sister" has been the unrestricted right of railroads to be built wherever their projectors thought fit. As a result of this unrestricted right we find in all States of the Union cases where, after a road has been built and long maintained and has gotten its traffic well established, another road puts in a parallel line with the usual result that instead of having one strong road doing the traffic we have two weak roads, as they have to charge the same rate between competitive points, and we burden the public by compelling it to sustain two weak roads when one strong road would have been sufficient.
>
> How does this bill stop that? In this way: Before a road or an extension thereof can be built it must get what is called in this bill a certificate of convenience or necessity from the commission as a condition precedent to the building of a single rod of the extension or of the new line. That means that the commission must first investigate the situation. It must first consult the communities that would be connected or would be located on the proposed line. It must consult the shipping interests and producing interests and all other interests that might be involved and then determine whether or not it should

issue a certificate of convenience and necessity.

This is not new law. Several of the States have this same kind of law now, notably the State of New York and the State of Wisconsin and other States, and the law has worked successfully. It has prevented the construction of new lines that could not by any possibility have any hope of meeting operating expenses, not to say anything about profits. It would prevent the construction of some of these short lines which may have no hope of ultimate financial success. In every way we have felt that this provision would lessen the number of "weak sisters," would prevent the creation of any new ones, and would strengthen the existing lines. We can get better service by strengthening the existing line than by creating a rival or parallel line which would diminish the ability of the first line to make further improvements and betterments. We have also provided for abandonments.

Railroads sometimes desire to surrender the rights granted by their charter. The traffic is not what they expected, business conditions change, the natural resources they thought first to get out to the open market become depleted or become exhausted. There is no power now to restrain abandonment under Federal law. Railroads in many States can do as they will. We provide that there shall be some Federal control over the matter of abandonment, so that cities and

> villages that have been built up on these lines can be given due consideration by the regulatory body before the order for abandonment is issued. We give such control to the commission to investigate the situation and determine the facts. But neither provision, the building of new lines or the abandonment of old ones, affects spurs or switches or terminal tracks or interurban lines wholly within a State. These we leave to State control, where they already belong. (Cong. Rec., vol. 58, pt. 8, pp. 8309, 8316.)

In *Texas & Pacific* v. *Gulf, Colorado & Santa Fe*, 270 U. S. 266, 272, 277, 278, this Court, after observing that "paragraphs 19 and 20 provide that a *carrier* desiring to construct one (an extension) may apply for the certificate," said:

> A truer guide to the meaning of the terms extension and industrial track, as used in paragraphs 18 to 22, is furnished by the context and by the relation of the specific provisions here in question to the railroad policy introduced by Transportation Act, 1920. By that measure, Congress undertook to develop and maintain, for the people of the United States, an adequate railway system. It recognized that preservation of the earning capacity, and conservation of the financial resources, of individual carriers is a matter of national concern; that the property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall

upon the public; that competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury upon its rival, it may be the public which ultimately bears the loss. See *Railroad Commission* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563; *The New England Divisions Case*, 261 U. S. 184; *The Chicago Junction Case*, 264 U. S. 258; *Railroad Commission* v. *Southern Pacific Co.*, 264 U. S. 331. The Act sought, among other things, to avert such losses.

When the clauses in paragraphs 18 to 22 are read in the light of this congressional policy, the meaning and scope of the terms extension and industrial track become clear. The carrier was authorized by Congress to construct, without authority from the Commission, "spur, industrial, team, switching or side tracks . . . to be located wholly within one State." Tracks of that character are commonly constructed either to improve the facilities required by shippers already served by the carrier or to supply the facilities to others, who being within the same territory and similarly situated are entitled to like service from the carrier. The question whether the construction should be allowed or compelled depends largely upon local conditions which the state regulating body is peculiarly fitted to appreciate. Moreover, the expenditure involved is ordinarily small. But where the proposed trackage extends into territory not theretofore served by the carrier, and particularly where

it extends into territory already served by another carrier, its purpose and effect are, under the new policy of Congress, of national concern.

See also *Railroad Commission* v. *Southern Pacific*, 264 U. S. 331, 344, 345.

Coming now to paragraph 9, the whole situation is exactly the reverse. There the shipper or a lateral branch line may set the machinery of the Commission in motion; thus, "any common carrier * * * upon application * * * of any *shipper* tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such * * * private sidetrack which may be constructed to connect with its railroad * * *."

Paragraphs 19 to 21 are negative, whereas paragraph 9 is positive.

The amendment of 1910 also allowed any lateral branch line to file a complaint. Prior to that time only the shipper might file the complaint. "It is plain from the provisions of the act, the history of the amendments and justice, that the object was not to give a roving commission to every road that might see fit to make a descent upon a main line, but primarily, at least, to provide for shippers seeking an outlet either by a private road or a branch." (*Interstate Commerce Commission* v. *Delaware, Lackawanna & Western*, 216 U. S. 531, 537.)

"The most obvious examples of such lines (lateral branch) are those that are dependent upon and in-

cident to the main line—feeders, such as may be built from mines or forests to bring coal, ore or lumber to the main line for shipment." (*United States* v. *Baltimore & Ohio*, 226 U. S. 14, 19.)

Opposing counsel refer to "a practically admitted state of facts." (Br. 3.) In two reports after two hearings the Commission has found that Dering Company has fulfilled the terms and conditions of the statute; thus, "We find that complainant's siding has been constructed, that application in writing has been made by complainant for a switch connection therewith, and that interstate traffic has been tendered by complainant within the meaning of section 1 of the act; that there will be sufficient business to justify the construction and maintenance of the proposed connection; that the proposed connection is reasonably practicable and can be put in with safety and that it should be constructed and maintained by defendant." (R. 128; 96 I. C. C. 153.)

Counsel may not successfully maintain the Illinois Central and the electric line were without legal authority to grant permission to Dering Company to build its switch track across their tracks. *A fortiori*, as a consideration, why may not those companies impose reasonable conditions to their advantage without liability to themselves and without laying themselves open to the charge of undertaking the extension of their lines or the construction of new lines such as are contemplated by paragraphs 18 to 21? Illinois Central and the elec-

tric line presumably acquired some useful right for what they gave up and that was all that happened.

The argument that the case is controlled by the statutes and decisions of the State of Illinois (*C., C., C. & St. L. Railway* v. *Commission*, 315 Ill. 461) might well be dismissed with a repetition of the statement of the full Commission. "We, of course, are not concerned with the character of the track with respect to intrastate commerce." (109 I. C. C. 57; R. 133.) But the learned counsel for the appellant have devoted a large part of their brief of 171 printed pages to that subject.

Dering Company has shipped one-fourth of its output to destinations other than in Illinois and claims that with the switch connection it would be very natural for it to divide the tonnage approximately equally between the two railroads. (96 I. C. C. 147; R. 121, 122.) Southern Illinois mines, in which group Dering Company belongs, located on either Illinois Central or C., C., C. & St. L. ship substantial quantities of coal to Iowa, Michigan, and Indiana. (96 I. C. C. 148; R. 122.)

The fact that the switch track may also be used for the handling of intrastate traffic even in larger volume than the interstate traffic does not invalidate the order or stay the power of the Interstate Commerce Commission.

The power of Congress or its appropriate agencies without regard to any distinction between the dual character of interstate and intrastate traffic is established.

Switch connection. (*United States* v. *New York Central*, 272 U. S. 457.)

Recapture of Excess Earnings. (*Dayton-Goose Creek Railway* v. *United States*, 263 U. S. 456, 485.)

Stockyards. (*Stafford* v. *Wallace*, 258 U. S. 495, 522.)

Intrastate rates higher than interstate rates between same points. (*Railroad Commission* v. *Chicago, Burlington & Quincy*, 257 U. S. 563, 585; *State of New York* v. *United States*, 257 U. S. 591; *United States* v. *Village of Hubbard*, 266 U. S. 474.)

Bills of lading. (*United States* v. *Alaska Steamship Co.*, 253 U. S. 113; *United States* v. *Ferger*, 250 U. S. 199.)

Car doors. (*Loomis* v. *Lehigh Valley*, 240 U. S. 43.)

Headlights. (*Atlantic Coast Line* v. *Georgia*, 234 U. S. 280.)

Full crews. (*Chicago Rock Island & Pacific* v. *Arkansas*, 219 U. S. 453; *St. Louis, Iron Mountain & Southern* v. *Arkansas*, 240 U. S. 518.)

Pre-cooling and pre-icing of refrigerator cars. (*Atchison, Topeka & Santa Fe* v. *United States*, 232 U. S. 199, 221.)

Books of account and records. (*Interstate Commerce Commission* v. *Goodrich Transit*, 224 U. S. 194.)

Employers' Liability. (*Second Employers' Liability Cases*, 223 U. S. 1.)

Live stock shall not be confined in cars for period exceeding 28 hours. (*United States* v. *Baltimore & Ohio*, 222 U. S. 8.)

Hours of service. (*Baltimore & Ohio* v. *Commission*, 221 U. S. 612.)

Running of separate trains instead of mixed freight and passenger trains. (*Missouri Pacific* v. *Kansas*, 216 U. S. 262, 269.)

Coal cars, distribution of. (*Interstate Commerce Commission* v. *Illinois Central*, 215 U. S. 452; *Same* v. *Chicago & Alton*, 215 U. S. 479.)

Automatic couplers, safety appliances. (*Johnson* v. *Southern Pacific*, 196 U. S. 1.)

Color blindness, employees. (*Nashville, Chattanooga & St. Louis* v. *Alabama*, 128 U. S. 96.)

Automatic train control. (*Delaware & Hudson* v. *United States*, 5 F. (2d) 831.)

Tickets. (*Commutation Rate Case*, 27 I. C. C. 549.)

Ash pans on locomotives. (Ash Pan Act, c. 225, 35 Stat. 476; U. S. C. Title 45, Sec. 17.)

Locomotive boilers. (Boiler Inspection Act, c. 103, 36 Stat. 913; U. S. C. Title 45, Sec. 23.)

Block signals. (Joint resolution, 34 Stat. 838; U. S. C. Title 45, Sec. 35; Urgent Deficiencies Act, Oct. 22, 1913, c. 32, 38 Stat. 212.)

Learned counsel say that the specially-constituted District Court "manifested an antipathy to the position taken by counsel for appellant that this track was unlawfully built and is shown by the evidence

to have been constructed for the purpose of invading the transportation territory of appellant." (Br. 119.) On motion for stay pending appeal "Counsel for appellant mentioned the *invasion of its coal field* by other carriers and the interference with its ordinary operations on tracks congested with the traffic of industries located on its own railway * * *." (Br. 124.) Similar arguments continue (Br. 125, 142) until counsel conclude a statement in quotation marks of their own: "In other words, notwithstanding the State and Nation are associate sovereignties each supreme within its jurisdiction, and notwithstanding the jurisdiction of Illinois exclusively covers the construction and maintenance of this track, yet because we have authority to order a switch connection with a track which *may be built* we will assume that Congress by the words *'may be built'* means that if the track is physically built no matter how built or whether it can be maintained Congress authorized the coordinate sovereignty, the United States, to aid the malefactors who built this track in violating the law of the sovereignty, Illinois, which the Constitution requires us to protect when acting within the scope of its jurisdiction." (Br. 155.)

The height of the argument appears to be reached with the words, "We are aware that the Constitution and laws of the State of Illinois in face of Federal jurisdiction are mere waste paper, but the Fed-

eral statute and this Court have established beyond the possibility of doubt that the construction and maintenance of this track, if a private side track as found by the Commission, are within the exclusive jurisdiction of the State of Illinois." (Br. 157.)

All of this argument appears to be addressed to a certain situation which has appeared in this case and which may be explanatory of many of the acts on the part of C., C., C. & St. L., *e. g.*, the failure, after having promised in writing to do so, to complete the connection of the switch and by such means to refuse to accept new traffic for its line to the extent of approximately 25 cars per day. In other words after Dering Company has expended approximately $100,000, C. C. C. & St. L. will not fulfil its written promise which would cost it about $2,000 and by which it would acquire substantial increase in profitable traffic.

The Commission found (96 I. C. C. 146; R. 120):

> Defendant owns approximately 39,000 acres of coal land adjacent to its right of way in Saline County. Some of this land has been leased to the O'Gara Coal Company on a royalty basis. It opposes the installation of the connection, apparently for fear that the Central might some day operate over complainant's line and in connection with the power company reach these valuable coal properties.

The ownership and lease of these coal lands by C., C., C. & St. L., which transports the coal to the

markets, may not be set up as a basis for its failure and refusal to complete the switch connection. The use of the expression "the malefactors who built this track" would indicate there is competition and rivalry in the mining, selling and transportation of coal.

Any attempt of the C., C., C. & St. L. to remove itself from under the obligations of the Interstate Commerce Act because forsooth it, too, is engaged in the coal business should be repelled only in the way in which the learned Circuit Judge appears to have adopted, if it be true he "manifested an antipathy to the position taken by counsel for appellant."

The history of the case and the nature of the controversy are not unlike the very recent *New York State Barge Canal case*, in which the New York Central Railroad refused to comply with the terms of the statute and the order of the commission principally because of its own traffic which it desired to protect. (*United States* v. *New York Central*, 272 U. S. 457.)

## CONCLUSION

The decree of the District Court dismissing the bill for want of equity should be affirmed.

WILLIAM D. MITCHELL,
*Solicitor General.*

BLACKBURN ESTERLINE,
*Assistant to the Solicitor General.*

NOVEMBER, 1927.

## APPENDIX A

Section 402 of the Transportation Act of 1920 provides (c. 91, 41 Stat. 476, 477; U. S. C. Title 49, Section 1, paragraphs (18) to (22)):

SEC. 402. The paragraphs added to section 1 of the Interstate Commerce Act by the Act entitled "An Act to amend an Act entitled 'An Act to regulate commerce,' as amended, in respect of car service, and for other purposes," approved May 29, 1917, are hereby amended to read as follows:

* * * * *

"(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall

first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment.

"(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this Act shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

"(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its

judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, or any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

"(21) The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this Act, party to such proceeding, to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used

in this Act, and to extend its line or lines: *Provided,* That no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier subject to this Act which refuses or neglects to comply with any order of the Commission made in pursuance of this paragraph shall be liable to a penalty of $100 for each day during which such refusal or neglect continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

"(22) The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

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66640—27——1

# In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 95

THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS Railway Company, appellant

*v.*

THE UNITED STATES OF AMERICA, INTERSTATE Commerce Commission, et al., appellees

## BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

### STATEMENT

No opinion was rendered by the lower court in this case.

This is an appeal from a final decree of the District Court of the United States for the Northern District of Illinois, Eastern Division, dismissing a bill of complaint filed by the appellant in which the court was asked to set aside an order of the Commission, Division 5, dated February 7, 1925, as amended by the Commission's order of March 1, 1926. The decree is set forth on page 162 of the record, and the bodies of the orders referred to read, respectively, as follows:

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and said division having, on the date hereof, made and filed a report containings [containing] its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof;

It is ordered, that the above-named defendant be, and it is hereby, notified and required to construct, on or before the 12th day of May, 1925, and maintain and operate thereafter, a switch connection between the siding of complainant, J. K. Dering Coal Company, and the line of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, the location and description of which properties are more fully and at large set out in the report of the Commission; the expense of such connection to be borne by said defendant.

And it is further ordered, that this order shall continue in force until the further order of the Commission.

(Rec. 129.)

It appearing, that on February 7, 1925, division 5 entered its report and order in the above entitled proceeding; that by order of May 11, 1925, the commission reopened said proceeding for further argument; and that by order of May 27, 1925, the effective date of the said order of February 7, 1925, was postponed until the further order of the commission;

It further appearing, that further argument having been had and the case submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having on the date hereof, made and filed a report on further argument containing its findings of fact and conclusions thereon, which said report, and report and order of February 7, 1925, are hereby referred to and made a part hereof:

It is ordered, that the said order of February 7, 1925, be, and it is hereby, made effective on May 4, 1926.

It is further ordered, that this order shall continue in force until the further order of the commission.

(Rec. 134.)

The order of February 7, 1925, was made pursuant to a complaint filed in the Commission's office by the J. K. Dering Coal Company, and under authority conferred upon the Commission by paragraph (9) of section 1 of the Interstate Commerce Act. The language of said paragraph is as follows:

Any common carrier subject to the provisions of this Act, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will

> furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper or owner of such lateral, branch line of railroad, such shipper or owner of such lateral, branch line of railroad may make complaint to the Commission, as provided in section thirteen of this Act, and the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor, and the Commission may make an order, as provided in section fifteen of this Act, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the Commission, other than orders for the payment of money.

The order of February 7 is based upon findings of the Commission, Division 5, which are:

> We find that complainant's siding has been constructed, that application in writing has been made by complainant for a switch connection therewith, and that interstate traffic has been tendered by complainant within the meaning of Section 1 of the Act;

> that there will be sufficient business to justify the construction and maintenance of the proposed connection; that the proposed connection is reasonably practicable and can be put in with safety and that it should be constructed and maintained by defendant. * * *. (Rec. 128.)

These findings were affirmed by the Commission in its report of March 1, 1926, wherein the Commission said:

> Upon petition of defendant we reopened this case for further argument which has been had. The material facts are stated in the report of division 5, 96 I. C. C. 143, and are not in controversy. They will be restated only in so far as is necessary for a proper understanding of this report. Briefly, complainant, also referred to as the coal company, is the owner and operator of a coal mine served by a branch line of the Illinois Central. This mine is located about 2.5 miles from Eldorado, Ill., at which point the Illinois Central connects with the line of the defendant, likewise referred to herein as the Big Four. A track, some 3 to 3.5 miles in length, has been constructed by the Illinois Central for and at the expense of the complainant from the lead track connecting the mine with the Illinois Central to a point adjacent to the right of way of defendant about three miles southwest of Eldorado. By these proceedings, commenced January 23, 1924, complainant seeks to have us issue an order, as provided by section 1,

paragraph (9), of the interstate commerce act directing the defendant to construct and maintain a switch connection between it [its] rails and the track aforementioned. Complainant's track crosses the rails of the Illinois Central and three public highways and also the rails of the Southern Illinois Railway & Power Company, hereinafter referred to as the traction company, which line, some twenty miles in length, parallels the line of the defendant from Eldorado to Carrier Mills, Ill. Along this route a number of coal mines are located, now served by the defendant only. The point at which the switch connection is sought with defendant is not far from the mine of the Wasson Coal Company. A copy of the contract under which the Illinois Central constructed the track from complainant's mine to the right of way of the defendant is attached hereto marked Appendix A. A contract was also entered into between the traction company and the complainant, whereby the coal company was granted permission to cross the tracks of the traction company, and the latter was given the right to construct a wye between its tracks and the coal company's track and to operate freight and passenger engines and trains thereon, subject to certain prior rights granted to the Illinois Central.

In November, 1922, a joint petition by the Illinois Central, the traction company, and the coal company, was filed with the Illinois Commerce Commission wherein permission

was sought to construct and operate a track from the mine of the coal company across the tracks of the Illinois Central and the traction company to a point adjacent to the right of way of the Big Four.

On December 14, 1922, the State commission granted permission to the Illinois Central for the construction of the track across the railways and highways mentioned. A petition was then made by the complainant in this case to the State commission for an order requiring the defendant to make a switch connection with this proposed track. The Big Four was not made a party to the first petition and did not know the petition had been filed until after the entry of the order therein. After the filing of the petition for a switch connection with the proposed track the Big Four filed a motion to set aside the first order and sought leave to appear and defend against the petition. The first petition was thereupon reopened and consolidated with the petition seeking the switch connection, and they were heard together. At the close of the hearing the petitioners to the joint petition first filed moved to modify the order of December 14 to limit the use of the proposed track to that of a private mine track. On May 3, 1923, an order was entered by the State commission authorizing the construction of a mine lead track by the complainant, but limiting the use of such track to those ordinarily appurtenant to a lead track to a mine. On May 8, 1923, further orders were issued out of the

same proceeding requiring the installation of a switch connection with defendant's track, but limiting its use in accordance with the order of May 3, 1923. From these orders of the State Commission the Big Four appealed, contending that the track when constructed would become a public track, that the State commission had no power to limit the use of the track and that the proposed track was not a private or spur track, but a track connecting three railways and an extension of the lines of these railways which was a matter solely within the jurisdiction of this commission. It was further contended that the contracts between the coal company and the Illinois Central and the traction company constituted leases, and that the coal company had no authority under its charter to build, own, lease, or operate a railroad, and that no such authority could be conferred upon it by the State commission. The issues thus raised were finally adjudicated by the Supreme Court of Illinois in Cleveland, C., C. & St. L. Ry. Co. v. Commerce Commission, 311 Ill., 461, 146 N. E. 606, following which the petition for reargument was filed.

The court held, in effect, that the contracts under which the track under consideration was built and the uses to which that track was to be put constituted an extension of the rails of the Big Four, as well as those of the Illinois Central, and the traction company; in short, that under the contracts between the coal company and the Illinois Central,

and between the coal company and the traction company, the track could not be considered as a private side track or spur. The court also held that as the coal company was already served by a railroad, section 5 of the State constitution did not give it authority to compel a connection with another railroad upon which it is not located "where, as here, such connection would be, in effect, extending the line of the railroad affected"; further, that a coal corporation is not a public utility and "possesses no charter powers to build a railroad." The orders of the State commission were held to be void and set aside.

The Supreme Court of Illinois is charged with the duty of construing the laws of the State of Illinois. Under the laws of that State a private track becomes a public track if and when it crosses a public highway. However, the laws of Illinois and the decision of the Supreme Court of that State in no way affect the character and use of this track in so far as interstate commerce is concerned. We must assume that even though the contracts between complainant, the Illinois Central, and the traction company are sufficient to give to either of those carriers the right to handle traffic in interstate commerce over this track for the public generally, the fact remains that before either of those carriers could exercise such right it would be necessary to first obtain from us a certificate of public convenience and necessity, as provided in paragraph (18) of section 1 of the interstate commerce act. We have issued no

such certificate. It follows that as to interstate commerce no carrier has a right of operation over this track which would change its character from a private track to a public track. We, of course, are not concerned with the character of the track with respect to intrastate commerce.

We affirm the finding of division 5. An appropriate order will be entered.

(Rec. 130–133.)

Points relied upon by appellant in support of its contentions that the decree of the lower court should be reversed and that the Commission's order of February 7, 1925, as amended by its order of March 1, 1926, should be set aside will be found on pages 483 and 484 of the record. The most important of these points appears to us to be appellant's contention that the orders are not supported by evidence.

For convenience hereinafter the orders mentioned will be referred to as the order of February 7.

## ARGUMENT

### I

### THE COMMISSION'S FINDINGS SUPPORT THE ORDER OF FEBRUARY 7, AND THE FINDINGS ARE AMPLY SUPPORTED BY EVIDENCE CONTAINED IN THE RECORD

As above shown, the Commission found: That application in writing for the switch connection covered by the order of February 7, addressed to appellant, was made by the Dering Coal Company; that the coal company tendered interstate traffic to appellant for transportation; that there will be

sufficient business to justify the construction and maintenance of the connection; and that the connection is reasonably practicable and can be put in with safety. A comparison of these findings with paragraph (9) of section 1 of the Interstate Commerce Act, above set forth, will show that they are in accordance with the requirements of that paragraph, and, if supported by evidence, they are full authority for the action taken by the Commission in making and issuing the order of February 7.

We understand the findings, that application in writing for the switch connection was made and that interstate traffic was tendered for transportation, to be admitted by appellant, and an examination of pages 190 and 195 of the record will show them to be fully supported by evidence.

Concerning the business to be furnished by the coal company to appellant and transported over the connecting track, the Vice President of the coal company, Mr. Pauley, said:

> Assuming we have a connection with the Big Four, with the switch track in question, as to the approximate amount of tonnage that would be delivered to the Big Four for transportation from this mine and over this connection, I can only say that if we were located jointly on the Illinois Central and the Big Four it would be very natural for us to divide the tonnage approximately equal between the two railroads. What part of it might go to intrastate and what part to interstate I could not say with any degree of

> accuracy. At the present time we are getting out more than 50 cars per day. If the mine were at its capacity we would be getting more than 70 cars a day. At the present time, as I say, the inclination would be to divide the business equally, if there were no governing factors. We would then give the Big Four 25 cars per day, which would be 1,250 tons. I can state that there would be a substantial amount of tonnage delivered to the Big Four for shipments via its line to interstate points daily after this connection is provided. Based upon my knowledge of the markets and general conditions, that amount of tonnage should not be less than 20 cars. It would move to interstate destinations, largely. I would say if we were going to take interstate and intrastate we would be giving them more than 20 cars per day. A portion of that would move to Chicago. The freight rate from Eldorado to Chicago via the Big Four is $1.95. (*Rec.* 204–205.)

And a question asked by counsel and the answer of the Assistant to the Vice President of the coal company, Mr. Fenton, are:

> **Q.** Have you made any computation as to what revenue the Big Four would probably get on coal that would be delivered over this connection based upon your knowledge; if we had the connection, the number of carloads of coal per day that would be delivered to the Big Four?
>
> **A.** In any joint mines where I have had any experience, the tonnage moved relatively

> half and half. But assuming that it would not, and assuming that the J. K. Dering Coal Company could ship 20 cars per day, that would be 1,000 tons per day, or 200,000 tons per annum. The revenue to the Big Four would be, assuming a Chicago freight rate, $1.95 per ton, which figures $390,000 per annum gross revenue from the business.
>
> (Rec. 271.)

Evidence that the switch connection covered by the order of February 7 is practicable and can be put in with safety is as follows:

Pertinent statements made by Mr. Pauley are:

> I am generally familiar with the construction of mine tracks or the nature of mine tracks that serve mines in Illinois and Indiana. I became familiar with them by walking over them; seeing them in operation. At one time I had charge of the management of the Ogara Coal Company—over a period of approximately 2 years—from about April, 1917. At that time they had 10 mines in Saline County. I say that the track in question here can be operated with reasonable practicability and safety in the handling of coal cars, loaded and empty, from the Dering Coal Company Mine No. 2 to the connection of the Big Four. I am not a track expert, but I have seen mine tracks for 6 or 7 years. I have not seen any better than this, and my instructions to the experts who were to build this track—when we were negotiating a contract for that purpose—were to build the best they knew how for the purpose for

> which it is intended. The layout compares very favorably with reference to other lay-outs in southern Illinois that I know of—with reference to operation. (Rec. 194.)

Pertinent testimony of Mr. Oren, an engineer located at Effingham, Illinois, is:

> * * * In my opinion, a connection can be made between this track and the track of the Big Four so that the trains can be operated over there safely and not materially increase the hazard of operation on the track of the Big Four. * * *. (Rec. 225.)

Mr. Hunter, an engineer located at Danville, Illinois, testified as follows:

> It is my opinion that cars and engines may be operated over this track with reasonable safety. Comparing this lay-out with many other similar lay-outs that I have had experience with, with crossing stop signs requiring trains to stop in accordance with the law, that is, within 80 [800] feet of the crossing, I consider that that method of operation on this track would be had with a reasonable degree of safety. I know of several similar crossings in both Illinois and Indiana. I have had to do with the construction of tracks where a similar type of construction was used. I made an examination of the end of this track where the proposed connection with the Big Four would be made, and also of the point in the Big Four track where that connection would be located, and it is my opinion that such a connection could be made without materially increasing the hazard of

operation over this Big Four track. (Rec. 233–234.)

Appellant's Division Superintendent, Mr. Milligan, stated that appellant has two tracks leading in a westerly direction from Eldorado to Harrisburg, and described the use made of the most northerly of these tracks, with which the coal company's track, by the Commissioner's order of February 7, is required to be connected. Mr. Milligan, among other things, said:

> * * * We have 4 mines between Harrisburg and Eldorado that are adjacent to this track; but we serve 4 other mines from this track. They are located at various points on the L. & N. Railroad and on the Illinois Central. * * *. (Rec. 240–241.)

Thereupon, Mr. Hunter was recalled and testified as follows:

> I have heard the testimony of Mr. Milligan just given. Taking all the facts given by him and the situation as described by him, it is my opinion that this track can be connected with safety. I will go further and say that, if all this movement about which I have heard in the testimony was over one track, in both directions, it could still be connected without unreasonable hazard. In my judgment, it would not materially increase the hazard of operation over this track of these trains that Mr. Milligan has mentioned. (Rec. 242.)

We think the foregoing establishes that the Commission's findings of fact support the order of February 7 and that the findings are in turn supported by the evidence upon which they are based. However, a contrary view is expressed by appellant, as we will show under the next heading.

## II

### PARAGRAPH (9) OF SECTION 1 OF THE INTERSTATE COMMERCE ACT WAS NOT MODIFIED BY THE TRANSPORTATION ACT

No. 1 of the points relied upon by appellant in support of its contention that the order of February 7 should be set aside reads as follows:

> Because Paragraph "G" (or 9) of Section 1, of the Interstate Commerce Act was modified by Paragraphs 18 to 22 of Section 402 of the Transportation Act and a new policy established by which side, spur and industrial tracks were completely excluded from the jurisdiction of the Interstate Commerce Commission and committeed [committed] to the jurisdiction of the several states, and if the track in controversy is a side-track within the meaning of said Paragraph "G" (or 9) the Interstate Commerce Commission had no jurisdiction to require its connection, maintenance or disconnection, and if not no jurisdiction was conferred by the petition or complaint filed herein. (Rec. 483.)

Paragraphs (18) to (22), inclusive, of Section 402 of the Transportation Act are the same as paragraphs (18) to (22), inclusive, of Section 1 of the

Interstate Commerce Act, but we are unable to discover any language in those paragraphs which appears to us to show a disposition on the part of Congress to modify the authority over switch connections which, prior to the passage of the Transportation Act, had been conferred upon the Commission by paragraph (9) of Section 1 of the Interstate Commerce Act hereinbefore quoted. We understand the language principally relied upon in this connection by appellant is contained in said paragraph (22), which reads:

> The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State, or of street, suburban or interurban electric railways, which are not operated as part or parts of a general steam railroad system of transportation.

An examination of paragraphs (18) to (21) will show that they confer upon the Commission authority in addition to that which had previously been conferred by paragraph (9), and, since the restriction contained in paragraph (22) relates only to authority conferred by paragraphs (18) to (21), we think it is apparent that appellant's contention concerning a modification of paragraph (9) has no foundation upon which to rest.

## III

**PROCEEDINGS BEFORE THE ILLINOIS COMMERCE COMMISSION AND BEFORE CERTAIN COURTS OF THAT STATE DO NOT EVEN TEND TO ESTABLISH THAT THE ORDER OF FEBRUARY 7 IS INVALID**

Point IV of the points relied upon by appellant is as follows:

> The record shows that the J. K. Dering Coal Company first elected to proceed under a similar statute of the State of Illinois to obtain a connection between the track here involved and the railway of Appellant and relied upon substantially the same facts as are here involved. And adjudication of the issues in that case, therefore, is conclusive of the issues of material fact adjudicated as between the Appellant and the Dering Coal Company in this proceeding as to the status, relations of the parties and the application of the laws of Illinois thereto, and the J. K. Dering Coal Company was in law estopped to proceed upon the same matter before the Interstate Commerce Commission and, therefore, its petition should have been dismissed. (Rec. 484.)

The proceedings referred to in the above quotation are described in *Cleveland, C., C. & St. L. Ry. Co. v. Commerce Commission*, 146 N. E. Rep. 606, from which we quote as follows:

> Appellant seeks review of a judgment of the circuit court of Saline county, affirming two certain orders of the Illinois Commerce Commission, one of which granted permis

sion to the appellee, the J. K. Dering Coal Company, to construct and maintain at grade across the tracks of the Illinois Central Railroad Company, and across the tracks of the Southern Illinois Railway & Power Company, and across three highways in Saline county, a railroad track. The proposed track was to extend south from the coal mine of the coal company a distance of over 3½ miles, and across the two railroads and the three highways mentioned, to the right of way of the appellant, hereinafter called the Big Four. The second order appealed from required the appellant to construct, maintain, and operate on its own right of way a switch track, connecting the track authorized by the first order with the main track of appellant. * * * (Id. 608.)

* * * * *

* * * It * * * appeared on the hearing that the coal company had entered into a contract with the Illinois Central to build the proposed track at the expense of the coal company. By this contract the coal company gave to the Illinois Central the right to operate over the track with its trains and cars, the right to extend other tracks from it to other mines and properties, to change the grade of the track, to maintain additional crossings, to have the right of way in operation of its trains over the crossings, and to connect this track with its main line track. * * * The coal company also entered into a contract with the Traction company providing for a crossing over its rail-

way and a wye connection with it, and for the operation of the track jointly with the Illinois Central for passenger and freight service, conferring on the Traction company privileges similar to those granted to the Illinois Central, but subject thereto. (Id. 609.)

* * * * *

The first question involved in the case is whether or not this track, when constructed, would be a spur track, or, in fact, a railroad extension. If the former, jurisdiction lies in the Illinois Commerce Commission to enter the orders entered herein, provided the evidence shows a proper case; if the latter, the Commission has no jurisdiction, as jurisdiction over such matters is vested in the Interstate Commerce Commission by the federal Transportation Act. * * * (Id. 610.)

* * * * *

* * * These contracts, and the fact that this track constitutes an actual physical connection of three railroads, and is completely adapted to the extension of their lines, make it clear that if built it could not be said to be a private spur track merely for railway service to the coal company's mine. (Id. 611.)

* * * * *

* * * it is well settled in this state that a railway track built and connected as here proposed becomes thereby a part of the public railway highways of the state, free and open to the use of the public. * * *. (Id. 612.)

* * * * *

Appellees * * * urge that under section 45 of the Public Utilities Act they are entitled to this connection with appellant. That section provides as follows:

"Every railroad company, upon the application of any corporation or person, being a shipper or receiver or contemplated shipper or receiver of freight, or of any corporation, person or municipal corporation owning, operating or controlling any wharf or harbor facilities, for a connection between the railroad of such railroad company and any existing or contemplated track, tracks or railroad of such corporation, person or municipal corporation, shall make such connection and provide such switches and tracks as may be necessary for that purpose and deliver and receive cars thereover: Provided, that such connection is reasonably practicable and can be installed and used without materially increasing the hazard of the operation of the railroad with which such connection is sought, and that the business which may reasonably be expected to be received by such railroad company over such connection is sufficient to justify the expense of such connection to such railroad company."

(Id. 612.)

* * * * * * *

* * * The Illinois Commerce Commission has no powers except these [those] granted it by the Public Utilities Act. That act gives it no power to authorize private corporations to build railroads. Nor does it avail anything to say that under the contract

> between the parties the Illinois Central is to build the track. The evidence shows that the coal company is to pay for and own it. The railroad company is the agent of the coal company in the building of the track. (Id. 613.)
>
> * * * * *
>
> The orders of the Commerce Commission were void, and the circuit court erred in affirming them. The judgment of that court is therefore reversed, and the orders of the commission set aside. (Id. 613.)

It thus appears that the order of the Illinois Commerce Commission which authorized the Dering Coal Company to construct the track under consideration in this case, and the order of the Commission which required appellant to construct and maintain a switch connection between that track and appellant's track, were set aside by the Supreme Court of the State of Illinois because the court concluded that in making and issuing the orders the Illinois Commerce Commission exceeded the authority conferred upon it by the Public Utilities Act of that state; and it further appears that the findings of fact which the Illinois Commerce Commission must make before it can issue such a switch-connection order are entirely in harmony with the findings of fact upon which is based the Interstate Commerce Commission's said order of February 7. That such findings were made by the Illinois Commerce Commission in connection with its order authorizing the construction of the Dering

Coal Company mine lead track is shown by Exhibit No. XII, from which we quote as follows:

> The Commission having given due consideration to the petition in this case, and having caused the said proposed railroad crossings at grade to be viewed as required by law, and after full investigation and with due regard to the safety of life and property, is of the opinion and finds that the construction of the said mine lead track is necessary in order to facilitate the movement and distribution of coal cars to and from Dering Mine No. 2 and to increase the output thereof; that the installation of the said crossings will not unnecessarily impede or endanger traffic or transportation upon the railroad to be crossed; * * *. (Rec. 327.)

It is true that the Supreme Court of Illinois held that under the laws of that State the Dering Coal Company track, if constructed, would be a public railway highway, but we are unable to see how, consistently, it can be contended that this holding is a binding conclusion, or any conclusion at all, concerning the authority conferred upon the Interstate Commerce Commission by paragraph (9) of section 1 of the Interstate Commerce Act, which, as hereinbefore stated, is the paragraph under which the Commission operated in making and issuing the order of February 7.

As above shown, pertinent language contained in the Interstate Commerce Commission's report of March 1, 1926, is as follows:

> * * * We must assume that even though the contracts between complainant, the Illinois Central and the traction company are sufficient to give to either of those carriers the right to handle traffic in interstate commerce over this track for the public generally, the fact remains that before either of those carriers could exercise such right it would be necessary to first obtain from us a certificate of public convenience and necessity, as provided in paragraph (18) of section 1 of the interstate commerce act. We have issued no such certificate. It follows that as to interstate commerce no carrier has a right of operation over this track which would change its character from a private track to a public track * * *. (Rec. 133.)

## IV

**ACTION TO BE TAKEN BY THE COMMISSION UNDER PARAGRAPH (9) OF SECTION 1 OF THE INTERSTATE COMMERCE ACT DOES NOT DEPEND UPON THE LAW OF THE STATE OF ILLINOIS AS CONSTRUED BY THE SUPREME COURT OF THAT STATE OR UPON FINDINGS OF FACT MADE BY THAT COURT**

It will be seen that paragraph (9) of section 1 of the Interstate Commerce Act contains no language which indicates on the part of Congress an intention to allow the application of that paragraph to be controlled by the law of the State of Illinois or of any other state, and evidence included in the record under consideration here shows clearly that such control would be improper.

Matters advanced by appellant in support of its contention that the order of February 7 is invalid, in addition to those we have already discussed, are included in Nos. II and III of points relied upon by appellant, and are as follows:

> (a) The Complainant was not a shipper on Defendant's railway.
>
> (e) The track in controversy was built contrary to law and in contemplation of law is no track.
>
> The findings of the Commission are predicated upon immaterial facts, and the Commission omitted to make findings upon material issues presented by the pleadings and evidence.
>
> (Rec. 483–484.)

It is, of course, true that the mine of the Dering Coal Company was not connected with the line of railway of appellant until the switch connection required by the order of February 7 was made, but the record shows that the coal company, in purchasing its coal lands and in locating its mine, and in making other investments, acted in accordance with and relied upon what it understood to be a promise that the mine would be served by both the appellant and the Illinois Central, and also shows that service of the mine by the appellant is necessary to facilitate the shipment and transportation of coal in interstate commerce. In this connection we quote from the record as follows:

> About or prior to the time of the acquisition of the property and the location of the

mining shaft, we had negotiations with the defendant and Illinois Central with reference to the transportation service and transportation facilities for serving this mining property. (Rec. 184.)

* * * Had we not believed we had the consent of both railroads to give us service the shaft could have been located south of the Illinois Central where it would not have been necessary to cross the Illinois Central in order to reach the Big Four. * * *. (Rec. 185.)

The complainant would not have invested money in the mining property here under consideration had it not been assured by the defendant it would have service and would be able to obtain service from that company in the mining and shipping of its coal. * * *. (Rec. 186.)

The approximate cost of this track, including the right of way, to the Dering Coal Company will exceed $100,000. (Rec. 195.)

* * * Should we not get a connection to the Big Four Railroad, we would find ourselves with this large mine on the branch line of the Illinois Central Railroad which we knew when we bought the property could not serve us satisfactorily, and which fact has since been demonstrated. * * *. (Rec. 196.)

* * * If we had a direct connection with the Big Four the movement of traffic to a great many stations in Indiana and Michigan would be a one-line haul. The

market of this particular mine today is up through Illinois to Chicago and points beyond. It has not developed any market to any great extent in Indiana and Michigan because of the railroad facilities. (Rec. 202–203.)

As to whether or not I have any opinion as to the fact that we do not have a direct connection having anything to do with our inability to market coal in Indiana and Michigan: That reason has been given me by salesmen. * * *. (Rec. 203.)

* * * We want the service of the Big Four Railroad, as demonstrated by the fact that we are paying $100,000 to get it, which is a lot of money for a coal company and we are not kidding ourselves or you. We would not spend $100,000 for something we did not need. I think we need it or we would not do it. * * *. (Rec. 219.)

* * * We didn't sink our mine between the Illinois Central and the Big Four because the lay of the land, the slope of the surface would lend itself better to the building of mine sidings, give us the natural grades we wanted in the location in which we placed the mine, and we had the agreement of two reputable railroads to give us joint service. Therefore we thought it made no difference. I refer to Mr. Worcester's agreement to make a reciprocal arrangement with the Illinois Central which would give us the service of both roads. * * *. (Rec. 220.)

> • • • Mr. Worcester is Vice President and General Manager of the Big Four. • • •. (Rec. 211.)
>
> • • • This mine has a very poor, let us say, production history. It is 7 years old and should have reached its full capacity long ago under normal conditions. The reason that it has not reached its normal capacity is by reason of the inadequate railroad service and lack of markets. • • •. (Rec. 257.)

To the same effect see record 197, 198, 200, 208, 258, 259, 260, 261, and 269.

The above excerpts are taken from the testimony of the Vice President of the Dering Coal Company, Mr. Pauley, and appears to us to be very much in conflict with a finding of fact contained in the aforesaid decision of the Supreme Court of Illinois, which finding is as follows:

> • • • It is not shown that the coal company is unable to reach any desirable market with the service given by the Illinois Central. • • •. (Id. 609.)

The Supreme Court of Illinois also found that:

> • • • No complaint to the Illinois Central arising out of lack of cars appears to have been made, or any proceedings had to secure more service from it. • • •. (Id. 609.)

Upon this point the testimony of Mr. Pauley, which we understand to be undisputed, is:

> • • • We have complained to the Illinois Central about our service at the mine;

> we have complained all the way from Carbondale, their division headquarters, to Chicago; going from their car distributor and train dispatcher all the way to Mr. Markham, the president of the road. * * *. (Rec. 221.)

That the track of the Dering Coal Company would not have been constructed if the coal company had not been assured by appellant's traffic manager, Mr. Stevenson, that the track if constructed would be connected with appellant's line of railway is indicated by questions and answers included in the record, which are as follows:

> Q. After my conference with you of September, 1922, wherein it was suggested that we desired a connection with your company for the purpose of serving this mine, as I understand it you took the matter up with Mr. Worcester and it was agreeable to make a physical connection with a track we might construct?
>
> A. Yes, but that did not contemplate serving the mine in furnishing cars.
>
> Q. Mr. Worcester did not change his or you did not change your views on that matter until you learned the Illinois Central might at some future time use this track to invade your territory, as you termed it. Is not that the fact?
>
> A. That is what made the objection to making the connection, yes, but I cannot conceive of what possible advantage or use there would be in having a connection if we were

not going to serve the miners to furnish the cars.

By Director Bartel:

Q. That was what I was wondering, Mr. Stevenson. In that letter you wrote to Mr. Cardy November, 1921, you said you had no objection to making a connection there.

A. Yes, sir.

Q. What good would the connection be unless you served the mine?

A. None whatever. That is why I said I was surprised to find out about 8 months afterwards that they were getting ready to build a track.

Q. You told them to build a track and you would make a connection. Didn't you know if you made a connection it would be necessary for you to serve that connection?

A. I knew, but I did not suppose telling him we would only make a connection that he would go ahead and build the track. In other words, that was tantamount to saying no without saying no.

(Rec. 317.)

Notwithstanding appellant's statement that the Dering Coal Company track "was built contrary to law and in contemplation of law is no track," the record made before an examiner of the Commission on February 15, 16, and 18, 1924, appears to show that the construction of the track was completed after the order of the Illinois Commerce Commission authorizing the construction had been affirmed by the Circuit Court of Saline County, Illi-

nois, and before the date of the stay order entered by that court. In this connection we quote from the record as follows:

> * * * The track from the mine to the right of way of the Big Four was actually completed and laid to move cars thereon within the last few days. (Rec. 191.)
>
> Mr. Cardy: I will make the statement for the record that on January 11, 1924, the Circuit Court of Saline County affirmed both orders of the Commission. In affirming the order of the Commission it issued a so-called suspension order the first day of the April Term of the Supreme Court of Illinois, * * *. (Rec. 213.)

We are in doubt concerning the meaning of appellant's statements, that the findings of the Commission are predicated upon immaterial facts and that the Commission omitted to make findings upon material issues presented by the pleadings and evidence, because, as above shown, the findings made by the Commission were the only findings necessary to enable it to exercise the authority conferred upon it by paragraph (9) of section 1 of the Interstate Commerce Act and make the order of February 7. However, if appellant's contention is that the Commission should have made findings and reported conclusions in accordance with the law of the State of Illinois as construed by the Supreme Court of that state, we think the contention is fully answered by what we have already said.

For the reasons above set forth we insist that the appeal in this case should be dismissed.

Respectfully submitted.

P. J. FARRELL,

E. M. REIDY,

*For Interstate Commerce Commission,*

*Appellee.*

○

FILED
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CHARLES ELMORE CROPLEY
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IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1927.

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## No. 95

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THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY,

*Appellant,*

*vs.*

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND J. K. DERING COAL COMPANY,

*Appellees.*

---

**BRIEF FOR J. K. DERING COAL COMPANY.**

---

JAMES M. SHEEAN,
CLARENCE B. CARDY,
*Counsel for J. K. Dering Coal Company.*

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THE SOLE ISSUE BETWEEN APPELLANT AND THIS APPELLEE, VIZ:

WHETHER THERE IS GOVERNMENTAL POWER WHICH CAN COMPEL APPELLANT TO FURNISH THIS APPELLEE TRANSPORTATION FACILITIES LIKE UNTO THE FACILITIES WHICH APPELLANT FURNISHES ITS SIMILARLY-SITUATED AND COMPETITIVE CARRIER-OWNED COAL LANDS..... 3

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scription of which properties are more fully and at large set out in the report of the Commission; the expense of such connection to be borne by said defendant." (Italics ours.)

Such order was pursuant to and predicated upon the report of the Commission and the findings therein contained (R. 116-129) reported as *Dering Coal Company* v. *C. C. C. & St. L. Ry. Co.* 96 I. C. C. 143-153, which report resulted from petition (R. 84-88) filed by the Coal Company on January 23, 1924 (R. 116), answer of the railroad (R. 88-115), hearings at which much testimony was heard and numerous exhibits introduced (R. 180-435), proposed report submitted by the Examiner (R. 438-448), exceptions thereto by the railroad (R. 448-450) and brief in support of such exceptions (R. 492). Upon the railroad's petition for reargument and for extension of the effective date of the order, the proceedings were reopened (R. 63), further oral argument was had before the full Commission, briefs were submitted and in a report (R. 130-133) concurred in by the full Commission, the prior report and order of Division 5 was affirmed on March 1, 1926, and the following order was thereupon entered (R. 134):

"It appearing, that on February 7, 1925, division 5 entered its report and order in the above entitled proceeding; that by order of May 11, 1925, the commission reopened said proceeding for further argument; and that by order of May 27, 1925, the effective date of the said order of February 7, 1925, was postponed until the further order of the commission;

It further appearing, that further argument having been had and the case submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having on the date hereof, made and filed a report on further argument containing its findings of fact and conclusions thereon, which said report, and report

and order of February 7, 1925, are hereby referred to and made a part hereof;

It is ordered, that the said order of February 7, 1925, be, and it is hereby, made effective on May 4, 1926. It is further ordered, that this order shall continue in force until the further order of the commission."

THE ISSUE BETWEEN THE SHIPPER AND THE CARRIER.

The case, as between the shipper and the carrier, involves a single question, viz:

> Is there power, State or National, to compel the railroad, in its capacity as common carrier, to expend $2,000 and thus provide for Dering's 3,600 acres of coal land the same or similar transportation facilities which the carrier provides (R. 206) for the 39,000 acres of competitive coal lands owned by the railroad? (R. 305-306).

The Coal Company contends:

1. There is such power properly exercised herein by the order of the Interstate Commerce Commission (R. 116-129; 130-134)—such power being specifically given by paragraph 7 of Section 1 of the Interstate Commerce Act as amended by the Hepburn Act and the Mann-Elkins Act (24 Stat. 379, 34 Stat. 584, 36 Stat. 544), which by the amendment of February 28, 1920, c. 91, Sec. 402, became paragraph 9 of Section 1 of Title IV of the Transportation Act 1920 (41 Stat. 474-478) which is now paragraph 9 of Section 1 of Title 49 of the United States Code (44 Stat. 1652) as follows:

> "*Any common carrier* subject to the provisions of this chapter, *upon application of* any lateral, branch line of railroad, or of *any shipper* tendering interstate traffic for transportation, *shall construct*, maintain, and operate upon reasonable terms *a switch connection* with any such lateral, branch line of railroad, or private sidetrack which may be constructed to connect with its railroad, where such con-

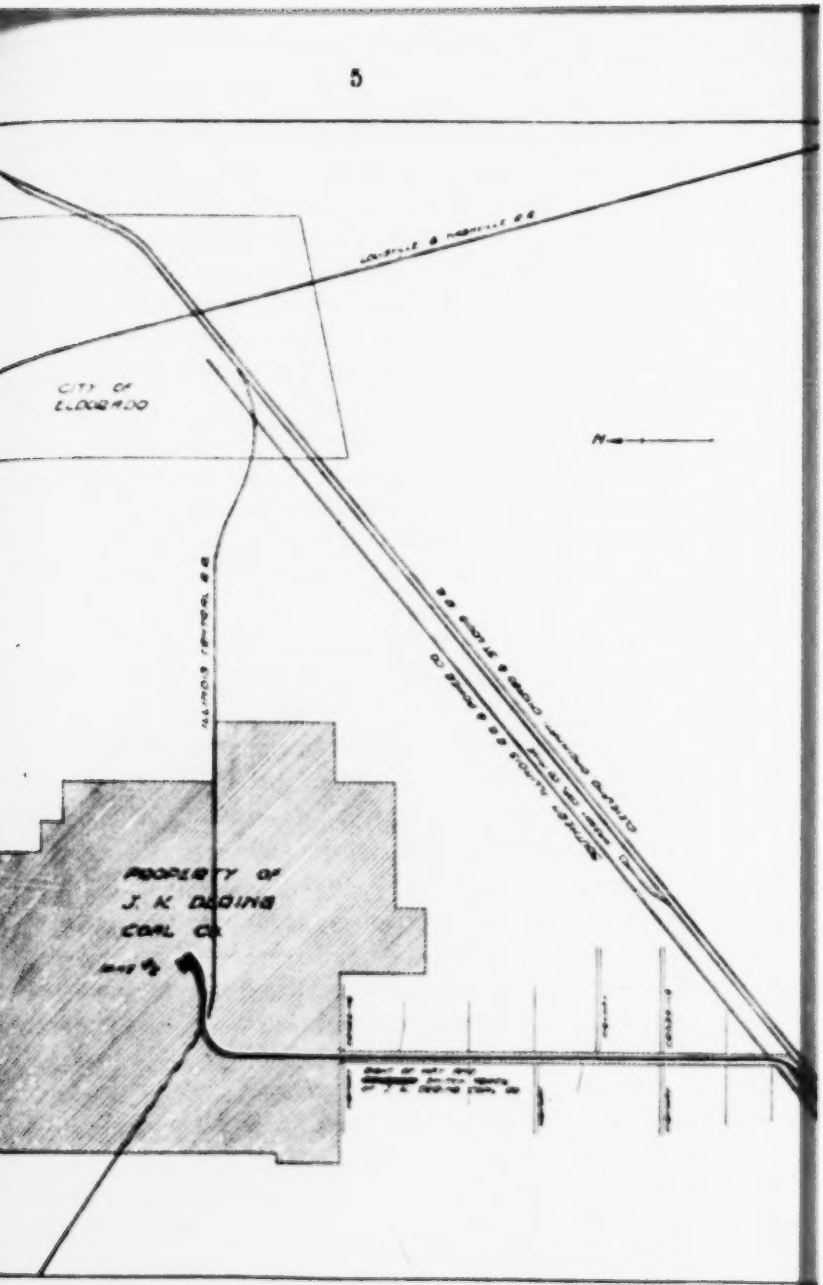
nection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper." (Italics ours.)

2. The sustaining of appellant's contentions herein would enable the railroad to accomplish the unthinkable result of having successfully resisted an order of the Illinois Commerce Commission on the ground that the Interstate Commerce Commission had sole and exclusive jurisdiction of the question whether this connection should or should not be made, and also successfully resisting the order of the Interstate Commerce Commission on the ground that this identical subject matter was *dehors* the jurisdiction of the Federal Commission.

## The Facts.

In 1917 the Coal Company acquired 3,670 acres of coal land in Saline County, Illinois, containing over 20,000,000 tons of bituminous coal, the southeast boundary of which tract is about ½ mile northwest of the right of way of the Big Four. The hoisting shaft and mine tipple were located in about the center of this acreage or some 2½ miles northwest of the appellant's right of way and immediately north of the right of way of the Illinois Central Railroad.

Sketch printed on the next page shows the *locus in quo*. On this sketch the Dering property is indicated by cross-hatching and consists of a generally rectangular tract, plus a 60-foot strip running to the right of way of the Big Four. This 60-foot strip is owned in fee by the Coal Company. (R. 209.)


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Prior to the acquisition of the property and the location of the mining shaft thereon, representatives of the Coal Company had negotiations with representatives of appellant with reference to transportation facilities for serving this mining property in which the Coal Company eventually made an investment of approximately $1,700,000. (R. 183.) Such an investment would not have been made without having assurance of the joint service of two railroads, and such assurance was given by the appellant orally and in writing. (R. 185-186.) The commercial necessity of obtaining direct track connection with the Big Four to enable this mine to reach markets in Indiana and Michigan by a one-line haul is developed in the testimony before the Commission. (R. 202, 203, 236.)

The underground development, the shafts and all the equipment were constructed and installed to give the mine a potential capacity of 4,000 tons per day which has been developed up to 3,500 tons per day (R. 183), but this potential capacity has been restricted to an actual output of about 2,000 tons per day through inadequate transportation facilities. (R. 196, 197.)

Under date of October 8, 1917 (Exhibit 1, R. 12) the vice president and general manager of the railroad agreed that when the mine had reached a certain point of production arrangements for Big Four service would be effected. The mine having reached, in the summer of 1919, the approximate tonnage referred to in the communication of the vice president and general manager of the railroad, the carrier was pressed by officials of the shipper to consummate the understanding that there would be brought about reciprocal switching arrangements with the Illinois Central which latter road was agreeable to this arrangement. (R. 186.) Officials of the railroad objected to making such reciprocal arrange-

ments and proposed, in lieu thereof, that there should be a switch track built connecting the mine with the Big Four track; and in July, 1919, a corps of railroad engineers, in co-operation with the engineer of the Coal Company, worked out on the ground a tentative switch track along practically the same route as the one which the Coal Company subsequently built. (R. 186.)

In the hope that reciprocal switching could be compelled and thus the expense of constructing the switch track might be avoided the Coal Company presented the matter to the Interstate Commerce Commission; but the Commission held that reciprocal switching could not be compulsorily ordered and dismissed the proceeding. (*Dering Mines Co.* v. *C. C. C. & St. L. Ry. Co.* 62 I. C. C. 265.)

Again the matter was taken up with officials of the railroad who advised, under date of November 1, 1921, as follows (R. 14, 118-119):

> **"If your Company cares to construct and maintain at your own expense a track from your mine up to our line, we will be glad to effect connection with such track, the point of connection of course to be designated by our Operating Department."**

Pursuant to the promise made in said letter the Coal Company (R. 188) promptly took steps to obtain options on a satisfactory right of way; and after acquiring such options a survey and plat were made and taken to the railroad offices in Cincinnati, where they were laid before the vice president and general manager for approval. (R. 189.)

The acquisition of fee title to this right of way cost the Coal Company about $33,000 (R. 188) and the cost of the completed track, including the right of way, exceeds $100,000. (R. 195.)

Having acquired the right of way it was necessary to

obtain an easement to cross the tracks of the Illinois Central (R. 97) and the Southern Illinois Railway and Power Company (R. 104) as well as the consent of the Commissioner of Highways. (R. 326.) These consents were obtained and the Illinois Commerce Commission (R. 325-331) approved the grant of such easements upon the condition that there be installed and maintained certain protections by it prescribed in its order entered May 3, 1923. (R. 325-331.)

Under date of May 8, 1923, the Illinois Commerce Commission entered an order (R. 331-336) requiring appellant to make the connection which is involved in this proceeding; but upon appeal to the Supreme Court of Illinois the Big Four was successful in its contention that the question whether this connection should or should not be made presented a matter wholly beyond the jurisdiction of the state authorities and was a question which was committed to the sole and exclusive jurisdiction of the Interstate Commerce Commission. This case is reported as *C. C. C. & St. L. Ry.* v. *Commerce Commission*, 315 Ill. 461, 146 N. E. Rep. 606; and the portion of such decision which is of materiality in this proceeding is as follows (315 Ill., p. 476):

> "Appellees also urge that under section 45 of the Public Utilities act they are entitled to this connection with appellant. That section provides as follows: 'Every railroad company, upon the application of any corporation or person, being a shipper or receiver or contemplated shipper or receiver of freight, or of any corporation, person, or municipal corporation owning, operating or controlling any wharf or harbor facilities, for a connection between the railroad of such railroad company and any existing or contemplated track, tracks or railroad of such corporation, person or municipal corporation, shall make such connection and provide such switches and tracks as may be necessary for that purpose and deliver and receive cars thereover;

*Provided,* that such connection is reasonably practicable and can be installed and used without materially increasing the hazard of the operation of the railroad with which such connection is sought, and that the business which may reasonably be expected to be received by such railroad company over such connection is sufficient to justify the expense of such connection to such railroad company.' This section cannot be held to apply to situations coming under the Federal Transportation act. As to such the latter act is supreme. Nor can it be said that the legislature in enacting section 45 sought to confer on the Illinois Commerce Commission jurisdiction of those matters coming under the Federal Transportation act. The steam railways involved here are interstate carriers. That which amounts to an extension of their lines is under the sole jurisdiction of the Interstate Commerce Commission, and the Illinois Commerce Commission is without jurisdiction."

## ARGUMENT.

Dering owns 3,670 acres of coal land in Saline County, Illinois. The Big Four owns approximately 39,000 acres of coal land in the same county which it leases to a mining company on a tonnage basis—by which is meant 2½ to 3c a ton royalty. (R. 305, 306.)

To secure the transportation facilities of the Big Four, and under assurances, oral and written, that such facilities would be given, Dering has expended $100,000 in acquiring title to a strip of land and laying railroad tracks thereon from its mine to the Big Four right of way, where connection with the Big Four will cost $2,000 and where (as found by the Commission, R. 128):

1. Interstate traffic has been tendered;
2. There will be sufficient business to justify the construction and maintenance of the proposed connection;
3. The proposed connection is reasonable, practicable and can be put in with safety;
4. It should be constructed and maintained by the Big Four.

In these circumstances Dering asserts and the Big Four denies that there is governmental power which can compel the carrier to provide for the 3,670 acres the same or similar transportation facilities which, as such carrier, it provides for the 39,000 acres of competitive coal owned by itself.

The Big Four defeated the exercise of state power by its claim in the Supreme Court of Illinois (315 Ill. 461, 476) that Congress had taken exclusive possession of the field and had committed the question here presented solely to the Interstate Commerce Commission.

The Big Four here endeavors to defeat the exercise

of federal power by its claim that the question here presented is "committed solely to the jurisdiction of the Illinois Commerce Commission and the courts of Illinois by paragraph 22 of Section 1 of the Interstate Commerce Act." (Brief, p. 12.)

Paragraph 9 of Section 1 of Title 49 of the United States Code herein above quoted, has been in force since the enactment of the Hepburn Act of June 29, 1906, and has been repeatedly and effectively enforced by the Interstate Commerce Commission. See *Winters Metallic Paint Co.* v. *C. M. & St. P. Ry. Co.* 16 I. C. C. 587; *Imperial Wheel Co.* v. *St. L. I. M. & S. Ry.* 20 I. C. C. 56; *Ridgewood Coal Co.* v. *Lehigh Valley R. R.* 21 I. C. C. 183; *Ralston Townsite Co.* v. *M. P. Ry. Co.* 22 I. C. C. 354; *John Montano* v. *P. C. C. & St. L. Ry.* 48 I. C. C. 728; *Virginia Coal and Fuel Co.* v. *N. & W. Ry.* 55 I. C. C. 61; *Schlicher* v. *Director General*, 62 I. C. C. 181.

Is there logical or plausible basis for appellant's contention that (Brief, p. 46):

> "Paragraphs 18-22, of section 402 of the Transportation Act have so amended and modified paragraph 9, or (G), of section 1, of an Act to Regulate Commerce, approved February 4, 1887, that the Interstate Commerce Commission has no jurisdiction to order a connection between an industrial or spur-track constructed to serve an industry and the railway of an interstate carrier, though said track be useful and used in the transportation of both interstate and intrastate commerce, and no jurisdiction to require such a track or such a connection to be maintained, used or operated in interstate commerce, and for that reason the orders of the Interstate Commerce Commission here involved are void"

or for appellant's contention that (Brief, pp. 47, 48):

> "The power, jurisdiction and authority of the Interstate Commerce Commission and the federal courts over the construction, maintenance and oper-

> ation of a connection with the proposed track is controlled by the proviso in Paragraph 22, Section 402 of the Transportation Act in relation to spur, industrial, team, switching and sidetracks located, or to be located, wholly within a single state"

or for appellant's contention that (Brief, p. 61):

> "Paragraph G (or 9) of Section 1 of the Interstate Commerce Act was modified by Paragraphs 18 to 22 of Section 402 of the Transportation Act and a new policy established by which side, spur and industrial tracks (wholly within a single state), were completely excluded from the jurisdiction of the Interstate Commerce Commission and committed to the jurisdiction of the several states, and if the track in controversy is a sidetrack within the meaning of said paragraph G (or 9) the Interstate Commerce Commission had no jurisdiction to require its connection, maintenance or disconnection, and if not, no jurisdiction was conferred by the petition or complaint filed herein."

We respectfully submit that there is no such basis; and that a mere reading of said paragraphs 18 to 22 will so demonstrate. Paragraphs 18 to 21 (U. S. Code Title 49, Section 1, paragraphs 18-21) conferred upon the Commission power and authority never possessed prior to the enactment of the Transportation Act of February 28, 1920. Such additional power and authority made public convenience and necessity (to be evidenced by certificate of the Commission issued after hearing) the norm by which to determine whether lines of railroad, or extensions thereof, might be constructed, acquired, or operated, or existing lines or portions thereof might be abandoned. Paragraph 22 then provided:

> "*The authority of the commission conferred by paragraphs* (18) *to* (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or sidetracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

As lucidly stated by a specially-constituted court in the case of *Southern Railway Co.* v. *Shealy*, 18 F. (2d) 784, at page 787:

> "The only limitation upon the jurisdiction of the Commission is set out in paragraph 22 of section 1, which, by its terms, *is made to relate only to the authority of the Commission conferred by paragraphs 18 to 21, both inclusive.*"

In *Alabama and Vicksburg Ry. Co.* v. *Jackson and Eastern Ry. Co.* 271 U. S. 244, this court said at page 250:

> "In matters relating to the construction, equipment, adaptation and use of interstate railroad lines, *with the exceptions specifically set forth in paragraph 22*, Congress has vested in the Commission the authority to find the facts and thereon to exercise the necessary judgment."

There is not involved in this proceeding any application by any railroad company to operate on any part of the Dering track, nor for permission to operate the track as an extension of any line of railroad or as a connecting railroad. As clearly stated in the report of the Commission (R. 133) on which the order herein is predicated:

> "We must assume that even though the contracts between complainant, the Illinois Central, and the traction company are sufficient to give to either of those carriers the right to handle traffic in interstate commerce over this track for the public generally, the fact remains that before either of those carriers could exercise such right it would be necessary to first obtain from us a certificate of public convenience and necessity, as provided in paragraph (18) of section 1 of the Interstate Commerce Act. We have issued no such certificate. It follows that as to interstate commerce no carrier has a right of operation over this track which would change its character from a private track to a public track."

The sworn answers of the Illinois Central (R. 150, 151) and of the Southern Illinois Railway and Power

Company (R. 160) deny that they were parties to the proceedings before the Interstate Commerce Commission which resulted in the order under attack, and affirmatively state that they have made no threat, at any time to connect their respective tracks with the rails of the Big Four or to bring about such connection, and specifically deny any such attempt or threat; and upon the bill and such sworn answers upon motion of the solicitor of the Big Four the bill herein was dismissed as to the defendants Illinois Central and the Railway and Power Company (R. 162).

## Conclusion.

On January 23, 1924 (following more than six years of fruitless efforts to obtain Big Four service) Dering filed petition under paragraph 9 of Section 1 of the Interstate Commerce Act as amended. The Commission has found (R. 116-129; 130-133) and the record fully supports the findings that all the facts exist which are required by said paragraph 9 to entitle a shipper to the relief provided by said paragraph 9. Effective May 4, 1926 (R. 134) the shipper obtained said relief; and the specially-constituted court acted upon and applied the well-established rule (*U. S.* v. *New River Co.* 265 U. S. 533) that:

> "The authority conferred upon the Commerce Court by Sec. 207 of the Judicial Code was vested in the District Courts by the Act of October 22, 1913, and, like the authority previously exercised by the Federal Circuit Courts, is confined to determining whether the Commission's order violates the Constitution, or exceeds the power delegated by statute, or is an exercise of power so arbitrary as virtually to transcend the authority conferred. *Kansas City Southern Ry. Co.* v. *United States*, 231 U. S. 423, 439; *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 483, 489. See also *Interstate Commerce Commision* v. *Illinois Central R. R. Co.* 215 U. S.

452, 470; *Interstate Commerce Commission* v. *Union Pacific R. R. Co.* 222 U. S. 541, 547; *Intermountain Rate Cases*, 234 U. S. 476, 490; *Skinner & Eddy Corporation* v. *United States*, 249 U. S. 557, 562." (540) * * *

"The courts will not review determinations of the Commission made within the scope of its powers or substitute their judgment for its findings and conclusions. *Interstate Commerce Commission* v. *Illinois Central R. R. Co., supra*, 470; *Interstate Commerce Commission* v. *Union Pacific R. R. Co., supra*, 547; *Kansas City Southern Ry. Co.* v. *United States, supra*, 456; *United States* v. *Louisville & Nashville R. R. Co.* 235 U. S. 314, 320; *Manufacturers Ry. Co.* v. *United States, supra*, 488." (542)

If Dering's rights under the federal statute could be in anywise dependent upon or affected by any provisions of the state law of Illinois, then the federal courts would be neither precluded nor excused from exercising their independent judgment concerning the proper interpretation of such state laws—inasmuch as Dering's rights under the federal statute had accrued and application for the enforcement of such rights had been made to the designated federal tribunal prior to the decision of the Supreme Court of Illinois. (See *Great Southern Fireproof Hotel Co.* v. *Jones*, 193 U. S. 532; *Kuhn* v. *Fairmont Coal Co.* 215 U. S. 349; *Brewer-Elliott Oil and Gas Co.* v. *United States*, 270 Fed. 100, and many federal cases assembled in Judge Sanborn's opinion at pages 103, 104.)

In the case of *Great Southern Fireproof Hotel Co.* v. *Jones*, 193 U. S. 532, it is shown that the Supreme Court of Ohio had held void as violative of the Ohio constitution a certain mechanic's lien law under the provisions whereof the plaintiff brought suit in the federal court subsequent to the decision of the Supreme Court of Ohio. Although the suit in the federal court was not begun until after the decision of the Ohio Supreme

Court, the contracts under which liens were claimed had been entered into prior to such decision. This court observing (p. 548) that:

> "The decision of the State Court, as to the constitutionality of the Statute in question, having been rendered after the rights of the parties to this suit had been fixed by their contracts, the Circuit Court would have been derelict in duty if it had not exercised its independent judgment touching the validity of the Statute here in question,"

held that the decision of the Ohio Supreme Court construing the Ohio Constitution was wrong and said (p. 550):

> "The great weight of authority in this country as to the meaning and scope of constitutional provisions substantially like those to be found in the Constitution of Ohio is, in our opinion, against the conclusion reached by the learned State Court. Exercising an independent judgment on the subject, we are obliged to so declare."

We respectfully submit, however, that the case at bar does not require or occasion consideration or decision of the correctness or incorrectness of anything *said* by the Supreme Court of Illinois in 315 Ill. 461. What the Supreme Court of Illinois *decided*, as we have heretofore pointed out, was that the question whether the Big Four should or should not make this track connection (p. 476):

> "is under the sole jurisdiction of the Interstate Commerce Commission, and the Illinois Commerce Commission is without jurisdiction"

By reason whereof (p. 478):

> "The orders of the Commerce Commission were void and the Circuit Court erred in affirming them."

To the frequently reiterated argument of appellant that the acquisition by Dering, in fee, of title to the 60-foot strip and the laying of railroad tracks thereon are "beyond the charter power of the Coal Company" (Brief, pp. 8, 52, 71, 74, 115, 116, 135-138) it would seem

to be a sufficient answer (entirely aside from the principle of equitable estoppel which should arise out of appellant's conduct in having induced, by its oral and written representations, the expenditure by appellee of over $100,000 for this property) to suggest that neither the Interstate Commerce Commission nor the courts which review its orders, nor the Big Four are interested in or concerned with this "*ultra vires*" question. As stated in *Kerfoot* v. *Farmers and Merchants Bank*, 218 U. S. 281, 287, quoting from *National Bank* v. *Matthews*, 98 U. S. 621:

> "Where a corporation is incompetent by its charter to take a title to real estate, a conveyance to it is not void, but only voidable, and the sovereign alone can object. It is valid until assailed in a direct proceeding instituted for that purpose. *Leazure* v. *Hillegas*, 7 Serg. & R. (Pa.) 313; *Goundie* v. *Northampton Water Co.* 7 Pa. St. 233; *Runyon* v. *Coster*, 14 Pet. 122; *The Banks* v. *Poitiaux*, 3 Rand. (Va.) 136; *McIndoe* v. *The City of St. Louis*, 10 Missouri, 575, 577. See also *Gold Mining Co.* v. *National Bank*, 96 U. S. 640."

It is respectfully submitted that the judgment of the court below should be affirmed.

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